1818. correction of errors in this case, be, and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum on the amount of the judgment of the said court, for the trial of impeachments and correction of errors of the state of New-York, to be computed from the time of the rendition of the judgment of the said court for the trial of impeachments and correction of errors of the state of New-York.

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(CONSTITUTIONAL LAW.)

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Admitting that the 3d article of the constitution of the United States, which declares that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction," vests in the United States exclusive jurisdiction of all such cases, and that a murder committed in the waters of a state where the tide ebbs and flows, is a case of admiralty and maritime jurisdiction; Congress have not, in the 8th section of the act of 1790, ch. 9, "for the punishment of certain offences against the United States," so exercised this power as to confer on the courts of the United States jurisdiction over such murder.

Quære, whether courts of common law have concurrent jurisdiction with the admiralty over murder committed in bays, &c. which are enclosed parts of the sea?

Congress having, in the 8th section of the act of 1790, ch. 9, provided for the punishment of murder, &c. committed "upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state," it is not the offence committed, but the *bay*, &c. in which it is committed, that must be out of the jurisdiction of the state.

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The grant to the United States in the constitution of all cases of admiralty and maritime jurisdiction, does not extend to a cession of the waters in which those cases may arise, or of a general jurisdiction over the same. Congress may pass all laws which are necessary for giving the most complete effect to the exercise of the admiralty and maritime jurisdiction granted to the government of the Union. But the general jurisdiction over the place, subject to this grant, adheres to the territory as a portion of territory not yet given away: and the residuary powers of legislation still remain in the state.

Congress have power to provide for the punishment of offences committed by persons serving on board a ship of war of the United States, wherever that ship may lie. But congress have not exercised that power in the case of a ship lying in the waters of the United States; the words "within any fort, arsenal, dock-yard, magazine, or in *any other place* or district of country *under the sole and exclusive jurisdiction of the United States;*" in the third section of the act of 1790, ch. 9. not extending to a ship of war, but only to objects in their nature fixed and territorial.

The defendant, William Bevans, was indicted for murder in the circuit court for the district of Massachusetts. The indictment was founded on the 8th section of the act of congress of the 30th of April, 1790, ch. 9. and was tried upon the plea of not guilty. At the trial, it appeared in evidence that the offence charged in the indictment, was committed by the prisoner on the sixth day of November, 1816, on board the United States ship of war Independence, rated a ship of the line of seventy-four guns, then in commission, and in the actual service of the United States, under the command of Commodore Bainbridge. At the same time, William Bevans was a marine duly enlisted, and in the service of the United States, and was acting as sentry regularly posted on board of said ship, and Peter Leinstrum (the deceased, named in the indictment) was at the same time duly enlisted and in

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the service of the United States as cook's mate on board of said ship. The said ship was at the same time lying at anchor in the main channel of Boston harbours in waters of a sufficient depth at all times of tide for ships of the largest class and burden, and to which there is at all times a free and unobstructed passage to the open sea or ocean. The nearest land at low water mark to the position where the ship then lay, on various sides is as follows, viz: The end of the long wharf so called in the town of Boston, bearing south-west by south, half south at the distance of half a mile; the western point of William's Island, bearing north by west, at the distance between one quarter and one third of a mile; the navy yard of the United States at Charlestown, bearing north-west half-west, at the distance of three quarters of a mile, and Dorchester point so called, bearing south southeast, at the distance of two miles and one quarter, and the nearest point of Governor's Island so called, (ceded to the United States,) bearing southeast half-east, at the distance of one mile and three quarters. To and beyond the position or place thus described, the civil and criminal processes of the courts of the state of Massachusetts, have hitherto constantly been served and obeyed. The prisoner was first apprehended for the offence in the district of Massachusetts.

The jury found a verdict that the prisoner, William Bevans, was guilty of the offence as charged in the indictment.

Upon the foregoing statement of facts, which was

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stated and made under the direction of the court, the prisoner, by his counsel, after verdict, moved for a new trial, upon which motion two questions occurred, which also occurred at the trial of the prisoner. 1. Whether, upon the foregoing statement of facts, the offence charged in the indictment, and committed on board the said ship as aforesaid, was within the jurisdiction of the state of Massachusetts, or of any court thereof. 2d. Whether the offence charged in the indictment, and committed on board the said ship as aforesaid, was within the jurisdiction or cognizance of the circuit court of the United States, for the district of Massachusetts. Upon which questions, the judges of the said circuit court were at the trial, and upon the motion for a new trial, opposed in opinion; and thereupon, upon the request of the district attorney of the United States, the same questions were ordered by the said court to be certified under the seal of the court to the supreme court, to be finally decided.

Feb. 26th.

Mr. *Webster*, for the defendant. The ground of the motion for a new trial in this case is, that on the facts proved, the offence is not within the jurisdiction of the circuit court of the United States. The indictment is founded on the 8th section of the act of congress, for the punishment of certain crimes; by which act, murder is made cognizable in the courts of the United States, if committed "upon the high seas, or in any river, haven, bason or bay, out of the jurisdiction of any particular state." To sustain the jurisdiction, in this

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case, then it must appear, either that the place where the murder was committed was the "high seas," or that it was a river, bay, or bason, not within the jurisdiction of any state. 1. The murder was not committed on the *high seas*, because it was committed in a *port*, or *harbour;* and ports and harbours are not parts of the high seas. To some purposes, they may be considered as parts of *the sea*, but not of the *high sea*. Lord Hale says, "the sea is either that which lies within the body of a county or without. The part of the sea which lies not within the body of a county, is called the main sea or ocean."[a] By the "main sea" Lord Hale undoubtedly means the same as is expressed by "high sea," "*mare altum*," or "*le haut meer*." There is a distinction between the meaning of these last terms, and the meaning of *the sea*. And this distinction does not consist merely in this, that is "high sea" to low water mark only, and *sea* to high water mark, when the tide is full. A more obvious ground of distinction is, that the *high seas* import the unenclosed and open ocean, without the *fauces terræ*. So Lord Hale must be understood in the passage cited. Ports and harbours are, by the common law, within the bodies of counties; and that being the high sea which lies not within the body of any county, ports and harbours are, consequently, not part of the high seas. Exton, one of the distinguished advocates of the admiralty jurisdiction, sneers at the common

[a] *Hale, De Jure Maris.* ch. 4

lawyers, for the alleged absurdity of supposing ships to ride at ancher, or to sail, *within the body of the county*. The common lawyers might retort, the greater incongruity of supposing ports and harbours to be found on the *high seas*.[a] "Touching treason or felony," says Lord Hale, "committed on the high sea, as the law now stands, it is not determinable by the common law courts. But if a felony be committed in a navigable arm of the sea, the common law hath a concurrent jurisdiction."[b] A navigable arm of the sea, therefore, is not the high sea. The common and obvious meaning of the expression, "high seas," is also the true legal meaning. The expression describes the open ocean, where the dominion of the winds and waves prevails without check or control. Ports and harbours, on the contrary, are places of refuge, in which protection and shelter are sought from this turbulent dominion, within the inclosures and projections of the land. The high sea, and havens, instead of being of similar import, are always terms of opposition.

"Insula *portum*
Efficit objectu laterum: quibus omnis ab *alto*
Frangitur, inque sinus scindit sese unda reductos."

The distinction is not only asserted by the common lawyers, but recognised by the most distinguished civilians, notwithstanding what is said in the case in *Owen*,[c] and some other *dicta*. The statute 13 Rich

a Exton, 146. *b* 2 *Hale's P. C.* ch. 3. *c Owen*, 123.

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ard II. ch. 5, allows the admiral to entertain jurisdiction of things done *on the sea*, "*sur le meer.*" The civilians contend, that by this expression, the admiralty has jurisdiction in ports and havens, because the admiral is limited to such things as are done on *the sea*, and not to such only as are done on the *high sea*. In remarking upon this, and other statutes relating to the admiralty, in his argument for the jurisdiction of that court, delivered in the house of lords, Sir Leoline Jenkins says: "The admiral being a *judex ordinarius*, (as Bracton calls such as have their jurisdiction fixed, perpetual, and natural,) for 100 years before this statute; it shall not be intended to restrain him any further than the words do necessarily and unavoidably import. For instance, the statutes say, that the admiral shall intermeddle only with things done upon the sea; it will be too hard a construction to remove him further, and to keep him only *super altum mare:* if he had jurisdiction before in havens, ports, and creeks, he shall have it still; because all derogations to an antecedent right are odious, and ought to be strictly taken."[a] This argument evidently proceeds on the ground of an acknowledged distinction between *the sae*, and the *high sea;* the former including ports and harbours, the latter excluding them. Exton's comment on the same statute, 13 Richard II. ch. 5. is to the same effect. "Here, *sur le meer*," says he, "I hope shall not be taken for *super altum mare;* when as the statute is so absolutely free from distinguish-

[a] *Life of Sir L. Jenkins*, vol. 1. p. 77.

ing any one part of the sea from the other, or limiting the admiral's jurisdiction unto one part thereof, more than to another; but leaveth all his cognizance. But this I am sure of, that by the records throughout the reign [of Edward III.] the admirals were *capitanei et admiralli omnium portuum et locorum per costeram maris*, (as hath been already showed,) as well as of the main sea."[a] This writer is here endeavoring to establish the jurisdiction of the admiralty over ports and harbours, not as they are parts of the high sea, but as they are parts of the sea. He contends, therefore, against that construction of the statute by which jurisdiction on *the sea* would be confined to jurisdiction on *the high sea*. Upon the authority therefore, of the civilians themselves, as well as on that of the common law courts, ports and harbours must be considered as not included in the expression of the high seas. Indeed, the act of congress itself goes clearly upon the ground of this distinction. It provides for the punishment of murder and robbery committed on the high seas. It also provides for punishment of the same offences, when committed in ports and harbours of a particulur description. This additional provision would be absurd, but upon the supposition that ports and harbours were not parts of the high sea. 2 If this murder was not committed on the high seas, was it committed in such haven or harbour as is not within the jurisdiction of any state? The case states, that in point of fact, the jurisdiction of Massachusetts has been constantly exercised

a *Exton*, 100.

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over the place. *Prima facie* this is enough. It satisfies the intent of the act of Congress. It shows that the crime would not go unpunished, even if the authority of the United States court should not interfere. An actual jurisdiction in such case will be presumed to be rightful. Thus in the case of Captain Goodere, indicted for the murder of his brother, Sir John Dinley Goodere, in a ship, in Kingroad, below Bristol, the indictment being tried before the recorder of Bristol, and the murder being alleged to have been committed within the body of the county of that city, witnesses were called to prove that the process of the city government had frequently been served and obeyed, where the ship was lying when the murder was committed on board; and this was holden to be sufficient to show that the offence was committed within the jurisdiction of the city.[a] But the jurisdiction of Massachusetts, over the place where this murder was committed can be shown to be rightful. It is true that the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction; and it may be admitted, that this power is exclusive, and that no state can exercise any jurisdiction of that sort. Still it will remain to be shown, not only that this offence is one of which the admiralty has jurisdictioa, but also, that it is one of which the admiralty has *exclusive* jurisdiction. For although the state courts, and the courts of the United States, cannot have concurrent admiralty jurisdiction, yet the common law and the admiralty may have concurrent ju-

[a] 6 *State Trials*, 795.

risdiction; and the state court in the exercise of their common law jurisdiction, may have authority to try this offence, although it might also be subject to the concurrent jurisdiction of a court of admiralty, and might have been tried in the courts of the United States, if congress had seen fit to give the courts jurisdiction in such cases. But the act only gives jurisdiction to the circuit court, in cases where there is no jurisdiction in the state courts. The state courts exercise, in this respect, the entire common law jurisdiction. If, therefore, the common law has a jurisdiction in this case, either exclusive or concurrent, the authority of the circuit court under the act does not extend to it. In order to sustain this conviction, it must be shown, not only that it is a case of exclusive admiralty jurisdiction, but also that congress has conferred on the circuit court all the admiralty jurisdiction that it could confer. But congress has not provided, that the admiralty jurisdiction of the circuit court over offences of this nature shall be exercised, in any case in which there is a concurrent common law jurisdiction in the state courts. There is a jurisdiction, in this case, either exclusive or concurrent, in the common law; because the place where the murder was committed was a port or harbour, and all ports and harbours are taken, by the common law, to be within the bodies of counties. It is true, that by the statute 15 Rich. II. ch. 3. jurisdiction is given to the admiral over murder and mayhem, committed in

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a Comyn's Dig. Admiralty, E. *Bac. Abr.* Court of Admiralty, A. 2 *East's Crown Law*, 803.

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great ships, lying in the streams of great rivers, below the bridges near the sea. Lord Coke's reading of this statute would altogether *exclude* the admiral's jurisdiction from ports and harbours; but Lord Hale holds the jurisdiction to be concurrent. "This statute first gave the admiral jurisdiction in any river or creek within the body of a county. But yet observe, this is not exclusive of the courts of common law; and, therefore, the king's bench, &c. have herein a concurrent jurisdiction with the court of admiralty."[a] And this doctriue of Lord Hale, is now supposed to be the settled law in England; viz. that the common law and the admiralty have concurrent jurisdiction over murder and mayhem, committed in great rivers, &c. beneath the bridges next the sea. It is not doubted, certainly, that the common law has jurisdiction in such cases. In Goodere's case, before mentioned, some question arose, about the court in which the offender should be tried. The opinion of the attorney and solicitor general, Sir Dudley Rider and Sir John Strange, was that the trial *must* be in the county of the city of Bristol. He was accordingly, tried before Sir Michael Foster, recorder of the city, and convicted. From the terms in which the opinion of the attorney and solicitor general was expressed, it might be inferred that the common law was thought to have *exc'usive* jurisdiction of the case, agreeably to the well-known opinion of Lord Coke. At any rate, it was admitted to have jurisdiction, either exclusive or concurrent, and it

[a] *Hale's P. C. ch. 3.*

does not appear that the civilians who were consulted on the occasion, Dr. Paul and Sir Edmund Isham, doubted of this.[a] If, then, the common law would have jurisdiction of this offence in England, it has jurisdiction of it here. The admiralty will not exclude the common law in this case, unless it would exclude it in England. The extent of admiralty and maritime jurisdiction to be exercised under the constitution of the United States, must be judged of by the common law. The constitution must be construed, in this particular, by the same rule of interpretation which is applied to it in other particulars. It is impossible to understand or explain the constitution without applying to it a common law construction. It uses terms drawn from that science, and in many cases would be unintelligible or insensible, but for the aid of its interpretation.[b] The cases cited show, that the extent of the equity powers of the United States courts ought to be measured by the extent of these powers, in the general system of the common law. The same reason applies to the admiralty jurisdiction. There may be exceptions, founded on particular reasons, and extending as far as the reasons extend on which they are founded. But as a general rule, the admiralty jurisdiction must be limited as the common law limits it; and there is no reason for an exception in this case. There is no ground to believe that the framers of the constitution intended to revive the old contention between the common law and the

a *Dodson's Life of Sir Michael Foster*, p. 4.

b The United States v. Collidge, 1 *Gallis*, 488.

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admiralty. Whatever might have been the original merits of that question, it had become settled, and an actual practical limit had been fixed for a long course of years. They cannot be supposed to have intended to disturb this, from a general impression that it might have been otherwise established at first. This then being a case, in which the common law has jurisdiction, according to established rules and usage, the act of congress has conferred no power to try the offence on the courts of the United States.

Mr. *Wheaton*, for the United States. 1. The state court had *not* jurisdiction of this case, because the offence was committed on board a national ship of war, which, together with the space of water she occupies, is *extraterritorial* even when in a port of a foreign country; *a fortiori*, when in a port of the United states. A national ship is a part of the territory of the sovereign or state to which she belongs. A state has no jurisdiction in the territory of the United States. Therefore it has none in a ship of war belonging to the United States. The exemption of the territory of every sovereign from any foreign jurisdiction, is a fundamental principle of public law. This exemption is extended by comity, by reason, and by justice, to the cases, 1st. Of a foreign sovereign himself going into the territory of another nation. Representing the power, dignity, and all the sovereign attributes of his nation, and going into the territory of another state under the permission, which, in time of peace, is implied from the absence of any

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prohibition, he is not amenable to the civil or criminal jurisdiction of the country. 2 Of an ambassador stationed in a foreign country, as the delegate of his sovereign, and to maintain the relations of peace and amity between his sovereign and the state where he resides. He is by the constant usage of civilized nations, exempt from the local jurisdiction of the country where he resides. By a fiction of law, founded on this principle, he retains his national character unmixed and his residence is considered as a continued residence in his own country.[a] 3d Of an army, or fleet, or ship of war marching through, sailing over, or stationed in the territory of another sovereign. If a *foreign* sovereign, or his minister, or a foreign ship of war, stationed within the territorial limits of a particular state of the union, is in contemplation of law, extra-territorial and independent of the jurisdiction of that state, *a fortiori* must the army and navy of the *United* States be exempted from the same jurisdiction. If they were not, they would be in a worse situation than those of a foreign power, who are exempt both from the state and national jurisdiction. *Vattel* says that the territory of a nation comprehends every part of its just and lawful possessions.[b] He also considers the ships of a nation *generally portions of its territory*, though he admits the right of search for goods in merchant vessels.[c] *Grotius* comes more directly to

a The Dardoline, 6 *Rob.* 463.
b *Droit des Gens*, L. 2 ch. 7 s. 80
c *Id.* L. 1 ch. 19 s. 216, 217.

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the point we have in view. He holds, that sovereignty may be acquired over a portion of the sea, "*ratione personarum*, UT SI CLASSIS, QUI MARITIMIS EST EXERCITUS, ALIQUO IN LOCO, MARIS SE HABEAT."[a] So, also, *Casaregis*, maintains the same doctrine, and fortifies his positions by multiplied citations from ancient writers of authority. He holds it as an undeniable and universally received principle of public law, that a sovereign cannot claim the exercise of jurisdiction in the seas adjacent to his territories, "*exceptis tamen Ducibus Generalibus vel Generalissimis alicujus exercitus vel classis maratimæ vel ductoribus etiam alicujus navis militaris nam isti in sous milites gentem et naves libere jurisdictionem sive voluntariam sive contensiosam sive civilem, sive criminalem in alieno territoria quod occupant tamquam in suo proprio exercere possunt*," &c.[b] The case of the Exchange, determined in this court after a most learned, able, and eloquent investigation puts the seal to the doctrine.[c] If, in that case, the exemption of *foreign* ships of war from the local jurisdiction, be placed on the footing of implied or express assent; that may more naturally and directly be inferred in the case of a state of this Union, a member of the confederacy, than of a foreign power, unconnected by other ties, than those of peace and amity which prevail between distinct nations. The exclusive jurisdiction which the United States have in forts and dock-yards ceded to them, is derived from the *express*

a De Jur. Bel. ac Pac. L. 2 c. 3 § 13.
b Dis. 174. 136. *c* 7 *Cranch.* 116.

assent of the states by whom the cessions are made. It could be derived in no other manner; because without it, the authority of the state would be supreme and exclusive therein. But the exclusive jurisdiction of the United States on board their ships of war is not derived from the *express* assent of the individual states; because the United States have it in common with oll other independent powers; they have it by the public law of the world; a concession of it in the constitution would have been merely declaratory of that law. The power granted to congress by the constitution, "to make rules for the government of the land and naval forces," merely respects the military police of the army and navy, to be maintained by articles of war which form the military code. But this case is not within the grasp of that code, the offence being committed within the jurisdiction of the United States. The power of a court martial to punish murder, is confined to cases "without" the United States, by the act of the 23d of April, 1800, for the government of the navy, ch. 33. In England, murder committed in the army or navy, is triable, (not by courts martial) but in the ordinary criminal courts of the country. But in *what* courts? In the *national* courts. If committed on land, in the courts of common law: if committed within the limits of the admiralty jurisdiction, at the admiralty sessions.[a] In the memorable case of the frigate *Chesapeake*, the pretension of searching public ships for deserters was solemnly disavowed

[a] *Tytler's Military Law*, 153.

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by the British government, and their immunity from the exercise of any jurisdiction but that of the sovereign power to which they belong was spontaneously recognized.[a] The principle that every power has exclusive jurisdiction over offences committed on board their own public ships, *wherever they may be*, is also demonstrated in a speech of the present chief justice of the United States, delivered in the house of representatives on the celebrated case of *Nash* alias *Robbins*; which argument though made in another forum, and for another object, applies with irresistible force to every claim of jurisdiction over a public ship that may be set up by any sovereign power other than that to which such ship belongs.[b]

a Mr. Canning's Letter to Mr. Monroe, August 3d, 1807. 5 *Waites' Documents*, 89.

b Bee's Adm. Rep. 266. The Edinburgh Review for October, 1807, art. 1. contains an examination of this subject, in which the writer deduces the following propositions:

I. That the right to search for deserters on board of *merchant ships* rests on the same basis as the rights to search for contraband goods. The ground of this right being in each case the injury done to the belligerent—which can only be known by a search, and redressed by immediate impressment. P. 9.

II. That this right must be confined to merchant ships, and is wholly inapplicable to *ships of war* of any nation. That in case of the protecting of deserters by such ships the only remedy lies in negotiation and if that fails, in war. p. 9. 10.

The non-existence of the right to search national ships is inferred from the following arguments.

1. The great inconvenience of the exercise of the right—the tendency to create dissention.

2. The silence of all public jurists on the subject, though

All jurisdiction is founded on *consent*; either the consent of all the citizens implied in the social compact itself, or the express consent of the party or his so-

occasions have arisen in which its existence would have settled the question in dispute at once.

For example, the case of the Swedish convoy. The judgment of Sir W. Scott thereon. Dr. Croke's remarks on Schlegel's Work. Letters of Sulpicius. Lord Grenville's speech on the Russian treaty, November, 1810, p. 11.

III. The language of all treaties, in which the subject of search is mentioned, where it is always confined to *merchant ships*. Consolato del Mare, ch. 273. Treaty of Whitehall, 1661, art. 12. Treaty of Copenhagen, 1670, art. 20. Treaty of Breda, 1667, art. 19. Treaty of Utrecht, 1713, art. 24. Treaty of Commerce with France, 1786, art. 26. Treaty with America, 1795, art. 17, 18, 19. So, in the language of jurists, the right is always confined to merchant ships. Vattel, liv. 3, ch. 7. s. 113 and 114. Martens on Privateers, ch. 2. s. 20. Hubner, de la Saisie des batimens neutres, 1 vol. part 1. ch. 8. s. Whitlock's mem. p. 654. Molloy, de Jur. Mar. book 1. ch. 5.

IV. That the territory of an independent state is inviolable, and cannot be entered into to search for deserters. Vattel, li b 2. ch. 7. s. 93. s. 64, and s. 79.

That the same principle of inviolability applies to the national ships, and that these floating citadels are as much a part of the territory as castles on dry land. They are public property, held by public men in the public service, and governed by martial law. Moreover the supreme power of the state resides in them, the sovereign is represented in them, and every act done by them is done in his name.

V. From the analogical case of the rights and privileges of ambassadors, every reason for which applies strongly to the present exemption. Vattel, lib. 4. ch. 7 and 8. Grotius, de Jure Belli, 17. 4. 4.

VI. From the absurdity of

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vereign. But in this case, so far from there being any consent, implied or express, that the *state* courts should take cognizance of offences committed on board of ships of war belonging to the *United States*,

determining the claims of sovereign states in the tribunals of one of them: when these claims can only be decided by the parties themselves. Yet if search in such case be resisted, the admiralty would on capture be the judge. All jurists agree, that there is no human court in which the disputes of nations can be tried. And no provisions are made in any treaty for a trial of this nature, p. 15.

VII. That the naval supremacy of Great Britain affords no argument for the right.

That this naval supremacy was never admitted by other nations, generally, though it was by Holland. That it is confined to *the British seas*, and that even in them it only respects the mere right of salute, and no more. See Grotius, lib. 2. ch. 3. s. 8. 13. Puffendorff, de Jury Gent. lib. 4. ch. 5. s. 7. Seld. Mar. Claus. lib. ch. 14. Ibid. lib. 2. ch. Molloy b. 1. ch. 5. Treaty of peace and alliance with Holland, 1654. art. 13. Treaty of Whitehall, 162, art. 10. Treaty of Breda, 1667, art. 19. Treaty of Westminster, 1674, art. 6. Treaty of Paris, 1784, with Holland art. 2. Vattel, liv. 1. ch. 23. s. 289. p. 17, 18.

VIII. Two instances only exist of an attempt to claim the right, and these were of Holland. In the negotiation of the peace of 1654, Cromwell endeavoured to obtain from the Dutch the right to search for deserters in their vessels of war *within the British seas*. But this was rejected, and the right of salute only acknowledged. Soon after that peace (1654) the question was discussed in consequence of a Dutch convoy being searched *as to the merchant ships* in the channel. The Dutch government, on this occasion, gave public instructions to their commanders to allow the merchant ships to be searched, but never to allow the ships of war. Thurloe. 2. v. p. 503. p. 19, 20.

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those ships enter the ports of the different states under the permission of the state governments, which is as much a waiver of jurisdiction as it would be in the case of a foreign ship entering by the same permission. A foreign ship would be exempt from the local jurisdiction; and the sovereignty of the United States on board their own ships of war cannot be less perfect while they remain in any of the ports of the confederacy, than if they were in a port wholly foreign. But we have seen that when they are in a foreign port they are exempt from the jurisdiction of the country. With still more reason must they be exempt from the jurisdiction of the local tribunals when they are in a port of the Union.—2. The state court had *not* jurisdiction, because the place in which the offence was committed, (even if it had not been committed on board a public ship of war of the United States) is within the admiralty jurisdiction with which the federal courts are invested by the constitution and the laws. By the constitution, the judiciary power extends to "all cases of admiralty and maritime jurisdiction." There can be no doubt that the technical *common law* terms used in the constitution are to be construed according to that law, such as "habeas corpus," "trial by jury," &c. But this is a term of *universal* law, "cases of admiralty and *maritime* jurisdiction:" not cases of *admiralty* jurisdiction only; but the amplest, broadest, and most expansive terms that could be used to grasp the largest sense relative to the subject matter. The framers of the constitution were not mere common lawyers only. Their minds were liberalized by a knowledge of universal

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jurisprudence and general policy. They may as well, therefore, be supposed to have used the term *admiralty and maritime jurisdiction*, as denoting the jurisdiction of the admiralty in France, and in every country of the civilized world, as in England alone. But even supposing this not to have been the case, the statutes of Richard II. at their enactment, could not have extended to this country, because the colonies did not then exist. They could not afterwards on the discovery and colonization of this country become applicable here, because they are *geographically* local in their nature. British statutes were not in force in the colonies, unless the colonies were expressly, or by inevitable implication, included therein.[a] We never admitted the right of the British parliament to bind us in *any* case, although they assumed the authority to bind us in *all* cases. It is, therefore, highly probable that the framers of the constitution had in view the jurisdiction of those admiralty courts with which they were familiar. The jurisdiction of the colonial admiralty courts extended, *First.* To all maritime contracts, wherever made and wherever to be executed. *Secondly.* To all revenue causes arising on navigable waters. *Thirdly.* To all offences committed "on the sea shores, public streams, ports, fresh waters, rivers, and arms as well of the sea as of the rivers and coasts," &c.[b] But if this construction should not be tenable, it may be shown that an offence committed in the

a 1 *Bl. Com.* 407, 108.

b De Lovio v. Boit, 2 *Gallis.* 470. Note 47.

place where the record shows this crime was committed, is within the rightful jurisdiction of the admiralty, according to English statutes and English authorities. Before the statutes of Richard II. the criminal jurisdiction of the admiralty extended to all offences committed on the high seas, and in the ports, havens, and rivers of the kingdom.[a] Subsequently to the statutes of Richard, there has never been any question in England, that the admiralty had jurisdiction *on the sea coast* within the ebb and flow of the tide. The doubt has been confined to *ports and havens*. But "*the sea*," technically so termed, includes ports and havens, rivers and creeks, as well as the *sea coasts*; and therefore the admiralty jurisdiction extends as well to *these* (within the ebb and flow) as to the *sea coasts*.[b] On this branch of the case it

a *Roughton's Articles* in *Clerk's Praxis*, 99, et infra. *Exton*, Book 12 and 13. *Selden*, De Dominio Maris, Book 2. ch. 24. *Zouch's* Jurisdiction of the Admiralty asserted, 96. *Hall's* Adm. Practice, XIX. *Spelman's Works*, 226, Ed. 1727.

b Nota, Que chescun ewe, que flow et reflew est appel bras de meer ci tant aunt come el flowe." 22 *Assise*, 93.

Choke, J. "Si jeo ay terre adjoint al mere issint que le mere ebbe et flow sur ma terre, quaint il flowe chescun poet pischer en le ewe que est flow sur ma tere, *car donques il est parcel de le mere*, et en le mere chescun homme poit pischer de common droit." *Year Book*, 8 Edw. 4. 19, a. S. C., cited 5 *Co. Rep.* 107

"It was resolved that where the sea flows and has *plenitudem maris*, the admiral shall have jurisdiction of every thing done on the water between the high water mark by the natural course of the sea; yet, when the sea ebbs,

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would be useless to do more than refer to the opinion of one of the learned judges of this court, [a] in which all the learning on the civil and criminal jurisdiction

[a] De Lovio v. Boit, 2 *Gallis*, 398.

the land may belong to a subject, and every thing done on the land, when the sea is ebbed, shall be tried at the common law, *for it is then parcel of the county and infra corpus comelatus*, and therewith agrees 8 Edw. 4. 19. a. So note that *below* the low water mark the admiral hath *the sole and absolute jurisdiction;* between the high water mark and low water mark, the common law and the admiral have *divisum imperium*, as is aforesaid, *scilicet* one *super acquam* and the other *super terram*." Sir Henry Constable's case, 5 *Co. Rep.* 106, 107.

"The place absolutely subject to the jurisdiction of the admiralty is *the sea*, which seemeth to comprehend public rivers, fresh waters, creeks and surrounded places whatsoever, within the ebbing and flowing of the sea at the highest water, the shores or banks adjoining, from all the first bridges sea ward, for in these the admiralty hath full jurisdiction in all causes criminal and civil, except treasons and right of wreck." *Spelman, of the Admiralty Jurisdiction, Works*, 226. *Ed.* 1727.

"The court was of opinion, that the contract being laid to be made infra fluxum et refluxum maris, it might be upon the high sea; and was so, if the water was at high water mark, for in that case there is divisum imperium between the common law and the admiralty jurisdiction, according as the water was high or low." Barber v, Wharton, 2 *Ld. Raym.* 1452.

The ancient commission issued under the statute 28 Henry VIII. ch. 15, concerning the trial of crimes committed within the admiralty jurisdiction, contains the following words, descriptive of the criminal jurisdiction of the court: "Tam in aut super mari, aut in aliquo porta, rivo, Aqua dulci, creca, seu loco quocunque infra fluxum maris ad plenitudem a quibuscunque

of the admiralty is collected together, and concentrated in a blaze of luminous reasoning, to prove that this tribunal, before the statutes of Richard II.

primus pontibus verses mare, quam super littus maris, et alibi abicunque infra jurisdictionem nostram maritimam, aut limites Admiralitatis Regninostri, et dominium nostrorum." *Zouch*, 112, 2 *Hale's P. C.* ch. 3, Lord Hale, speaking of this statute, 28 Hen. VIII. ch. 15, quoting the words which define the locality of the jurisdiction given to the high commission court, viz. "in and upon the sea, or in any other haven, creek, river, or place, where the admiral hath, or pretends to have power, authority, or jurisdiction." this seems to me to extend to great rivers, where the sea flows and reflows below the first bridges, and also in creeks of the sea at full water, where the sea flows and re-flows, and upon high water upon the shore, though these possibly be within the body of the county; *for there at least, by the statute of Rich.* II. *they have a jurisdiction;* and thus, accordingly, it has been constantly used in all times, even when judges of the common law have been named and set in their commission; but we are not to extend the words "pretends to have" to such a pretence as is without any right at all, and therefore, although the admiral pretends to have jurisdiction upon the shore when the water is re-flowed, yet he hath no cognizance of a felony committed there," &c. &c. 2 *Hale's P. C.* ch. 3.

The navy mutiny act of the 22 Geo. II. ch. 33, sec. 4, thus defines the jurisdiction of a navy court martial, to wit: "Nothing contained in the articles of war shall extend or be construed to extend, to empower any court martial, in virtue of this act, to proceed to the punishment or trial of any of the offences specified in the several articles, (other than the offences specified in the 5th, 34th and 35 articles and orders,) which shall not be committed *upon the main sea, or in great rivers only, beneath the bridges of the said rivers nigh to the sea, or in the haven, river, or creek within*

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had cognizance of all torts, and offences, on the high seas, and in ports and havens, as far as the ebb and flow of the tide; that the usual common law interpretation, abridging this jurisdiction to transactions wholly and exclusively on the high seas, is indefensible upon principle, and the decisions founded on it are irreconcilable with one another, whilst that of the civilians has all the consistency of *truth* itself; and that whether the English courts of common law be, or be not, bound by these decisions, so that they cannot retrace their steps, yet that the courts of this country are unshackled by any such bonds, and may and ought to construe liberally the grant of admiralty and maritime jurisdiction contained in the constitution. To the authorities there cited, add those in the margin, showing that the courts

the jurisdiction of the admiralty," &c. In the 25th section of the act is the following proviso: "Provided always, that nothing in this act shall extend, or be construed to extend, to take away from the Lord High Admiral of Great Britain, or the commissioners for executing the office of Lord High Admiral of Great Britain, or any vice-admiral, or any judge or judges of the admiralty, or his or their deputy or deputies, or any other officers or ministers of the admiralty, or any others having or claiming any admiralty power, jurisdiction, or authority within the realm, or any other of the king's dominions, or from any person or court whatsoever, any power, right, jurisdiction, pre-eminence, or authority, which he, or they, or any of them, lawfully hath, have, or had, or ought to have and enjoy, before the making of this act, so as the same person shall not be punished twice for the same offence." 1 M'Arthur on Courts Martial 174. 348. 4th Ed.

of admiralty in Scotland, France, and the other countries of Europe possess the extent of jurisdiction we contend for.[a] The liberal construction of the constitution, for which we contend, is strongly fortified by the interpretation given to it by the congress in an analogous case, which interpretation has been confirmed by this court. The judiciary act declares that revenue suits, arising of seizures on waters

a In Scotland, the delegate of the high admiral, who holds the court of admiralty, "is declared to be the king's justice general upon the seas, or fresh water, within flood and mark, and in all harbours and creeks," &c. 2 *Bro. Civ. and Adm. Law.* 30. 490. *Erskine's Institutes*, 34. 10th ed. "In Scotland,(as Welwood,a Scottish man, writes,) the admiral and judge of the admiralty hath power within the sea-flood, over all sea-faring men, and in all sea-faring causes and debates, civil and criminal: So that no other judge of any degree may meddle therewith, but only by way of assistance, as it was found in the action brought by Anthony de la Tour against Christian Martens, November 6, 1542." *Zouch.* 91.

"Connoitront (les juges de l'amiraute) pareillement des pirateries, pillages et desertions des equipages, et generalement de tous crimes et delits commis *sur mer,ses ports, havres, et rivages.*" *Ordonnance de la Marine*, L. 1. t. 2. art. 10, de la Competence. "L'amiraute etoit une veritable jurisdiction ayant le droit de glaive et consequemment de juger les personnes tant au criminel qu'au civil, et certaines choses qui par leur nature etoient purement maritimes, ce qui resulte du titre de la competence, art. 2 et 10. Le tribunal des juges consuls jugoient les choses commerciales; d'ou il resultoit que les amirautes connoissent de tous les proces, actions et contrats survenus pour vente de navires naufrages, assurances, etc. et les tribunaux consulaires de tous les actes de commerce purement mercantile." *Boucher, Droit Maritime.* 727

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navigable from the sea, &c. shall be causes of admiralty and maritime jurisdiction. And in the case of the *Vengeance*,[a] and other successive cases, the court has confirmed the constitutionality of this legislative provision. But neither the congress nor the court could make those suits *cases of admiralty and maritime jurisdiction* which were not so by the constitution itself. The constitution is the supreme law, both for the legislature and for the court. The high court of admiralty in England has no *original* jurisdiction of revenue causes whatever. But the colonial courts of admiralty have always had, and that inherent, independent of, and pre-existent to, the statutes on this subject.[b] The inevitable conclusion therefore is, that both the legislature and the court understood the term *cases of admiralty and maritime jurisdiction*, to refer, not to the jurisdiction of the high court of admiralty in England, as frittered down by the illiberal jealousy, and unjust usurpations of the common law courts; but to the admiralty jurisdiction as it had been exercised in this country from its first colonization. But it has been already shown that this jurisdiction extended to all crimes and offences committed in *ports and havens*. It therefore follows that such was the extent of the admiralty jurisdiction meant to be conferred upon the federal courts by the framers of the constitution. 3. By the judiciary act of 1789, ch. 25. the circuit court has jurisdiction of all crimes cognizable under the authority of the United States. By the act of

a. 3 *Dall.* 297. b. The Fabius, 2 *Rob.* 245.

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1790, ch. 9, it is provided that "if any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder, &c. "he shall suffer death." It appears by the face of the record itself that this murder was committed, *in fact*, "in a river, haven, or bay," and it has already been shown that *in law*, it was committed out of the jurisdiction of any particular state.

The *Attorney-General* on the same side. If the offence in question be not cognizable by the circuit court, it is entirely dispunishable. The harbour of Boston is bounded by three distinct counties, but not included in either; consequently the *locus in quo* is not within the body of any county. These three counties are Suffolk, Middlesex, and Norfolk; and are referred to as early as the year 1637, in the public acts of the colony of Massachusetts as then established.[a] It is not pretended that the place where the ship of war lay at the time this offence was committed is within the limits of the county of Middlesex. By the act of the legislature of Massachusetts on the 26th of March, 1793, all the territory of the county of Suffolk not comprehended within the towns of Boston and Chelsea, was formed into a new county by the name of Norfolk. And by this act and the subsequent acts of the 20th of June, 1793, and 18th of June, 1803, the county of Suffolk now comprehends only the towns of Boston and Chelsea. The

[a] *Colony Laws, ed.* 1672. *title Courts*, 36, 37

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locus in quo cannot be within the body of either of these counties, or of the old county of Suffolk; for there is no positive law fixing the local limits of the counties themselves, or of the towns included therein: and according to the facts stated on the record, it is at least doubtful whether a person on the land on one side of the waters of the harbour could discern what was done on the other side. [a] If the *locus in quo* be not within the body of any county, it is confessedly within the admiralty jurisdiction. That jurisdiction is *exclusively* vested in the United States' courts; [b] and therefore the state court could not take cognizance of this offence. To which ever forum, however, the cause be assigned, the accused is equally safe. In either court the trial is by a jury, and there is the same privilege of process to compel the attendance of witnesses, &c. The objection commonly urged to the admiralty jurisdiction, that it proceeds according to the course of the civil law, and without the intervention of a jury, would not apply. Besides, that objection is wholly unfounded, even as applied to the court when proceeding in criminal cases according to the ancient law of the admiralty, independent of statutes; when thus proceeding, it never acted without the aid of a grand and petit jury. There is no doubt the courts of the United States are courts of limited jurisdiction, but not limited as to each general class of cases of which they take cognizance. The terms of the constitution

a 2 *Hawkins, ch.* 9. *s.* 14. 2 *East's P. C.* 84.

b Martin v. Hunter, 1 *Wheat.* 333. 337.

embrace "ALL cases of admiralty and maritime jurisdiction;" civil and criminal, and whether the same arise from the locality or from the nature of the controversy. The meaning and extent of these terms is to be sought for, not in the common law, but in the civil law. Suppose the terms had been *jus postliminii*, or *jactitation of marriage*; where else, but to the civil law, could resort be had in order to ascertain their extent and import? It may be that the jurisdiction of the civil law courts is a subdivision of the great map of the common law; but in order to ascertain its limits, extent and boundaries, the map of this particular province must be minutely inspected. The common law had no imperial prerogative over the civil law courts by which they could be controlled, or have been in fact controlled. The terrors of prohibition were disregarded, and the contest between these rival jurisdictions was continued with unabated hostility until the agreement signed by all the judges in 1632, and ratified by the king in council.[a] The war between them would never have

[a] *Resolution upon the cases of Admiral Jurisdiction.* Whitehall, 18th February. Present, the king's most excellent majesty.

Lord Keeper,	Lord V. Wimbleton,
Lord Ab. of York,	Lord V. Wentworth,
Lord Treasurer,	Lord V. Falkland,
Lord Privy Seal,	Lord Bishop of London,
Earl Marshall,	Lord Cottington,
Lord Chamberlain,	Lord Newburgh,
Earl of Dorset,	Mr. Treasurer,
Earl of Carlisle,	Mr. Comptroller,
Earl of Holland,	Mr. Vice Chamberlain,
Earl of Denbigh,	Mr. Secretary *Coke*,
Lord Chancellor of Scotland,	Mr. Secretary Windebank,
Earl of Morton,	

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been terminated, but by the overruling authority of the king in council. A temporary suspension of hostilities had been effected by a previous agreement of

"This day the king being present in council, the articles and proposition following, for the accommodating and settling the difference concerning prohibitions, arising between his majesty's courts at Westminster, and his court of admiralty, were fully debated and resolved by the board; and were then likewise, upon reading the same, as well before the judges of his majesty's said courts at Westminster, as before the judge of his said court of admiralty, and his attorney-general agreed unto, and subscribed by them all in his majesty's presence, *viz.*

"1. If suit should be commenced in the court of admiralty upon contracts made, or other things personal done beyond the sea, or upon the sea, no prohibition is to be awarded.

"2. If suit be before the admiral for freight or mariner wages, or for breach of charter-parties, for wages to be made beyond the seas; though the charter party happen to be made within the realm; so as the penalty be not demanded, a prohibition is not to be granted. But if the suit be for the penalty, or if the question be made, whether the charter party be made or not; or whether the plaintiff did release, or otherwise discharge the same within the realm: this is to be tried in the king's courts, and not in the admiralty.

"3. If suit be in the court of admiralty, for building, amending, saving, or necessary victualling of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself a party; no prohibition is to be granted, though this be done within the realm.

"4. Although of some causes arising upon the Thames beneath the bridge, and divers other rivers beneath the first bridge, the king's courts have cognizance; yet the admiralty hath also jurisdiction there in the point specially mentioned in the statute of *Decimo quinto Richardi Secundi*, and also by ex-

the judges of the king's bench and the admiralty, made in 1575; but that agreement was soon violated by the common law courts.[a] So that the limits of the

position and equity thereof, he may inquire of and redress all annoyances and obstructions in those rivers, that are any impediment to navigation or passage to or from the sea; and no prohibition is to be granted in such cases.

"5. If any be imprisoned, and, upon habeas corpus brought, it be certified, that any of these be the cause of his imprisonment, the party shall be remanded.

"Subscribed 4th February, 1632, by all the judges of both benches." *Cro. Car.* 296, London Ed. of 1657. By Sir Harbottle Grimstone. These resolutions are inserted in the early editions of Croke's reports, but left out in the latter, seemingly *ex industria*. 2 *Brown's Civ. & Adm. Law.* 79.

a "*12th of May*, 1575.

"The request of the judge of the admiralty to the lord chief justice of her admiralty's bench, and his colleagues with their answers to the same.

"1st. *Request.* That after judgment or sentence given in the court of admiralty, in any cause or appeal made from the same to the high court of chancery, it may please them to forbear the granting of any writ of prohibition, either to the judge of said court or to her majesties delegates, at the sute of him by whom such appeal shall be made, seeing by choice of remedy in that way, in reason he ought to be contented therewith, and not to be relieved any other way.

"*Answer.* It is agreed by the lord chief justice and his colleagues, that after sentence given in the delegates, no prohibition shall be granted. And if there be no sentence, if a prohibition be not sued for within the next term following sentence in the admiralty-court or within two terms after at the farthest, no prohibition shall pass to the delegates.

"2*d Request.* That prohibitions hereafter be not granted upon bare suggestions or surmises, without summary examination and proof thereof, wherein it may be lawful to

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admiralty jurisdiction in England, as fixed at the time the United States' constitution was established, could not be ascertained by the common law alone. Re-

the judge of the admiralty, and the party defendant to have counsel, and to plead for the stay thereof, if there shall appear cause.

"*Answer.* They have agreed that the judge of the admiralty and the party defendant shall have counsel in court, and to plead to stay, if there may appear evident cause.

"*3d Request.* That the judge of the admiralty, according to such an ancient order as hath been taken by king Edward the first and his council, and according to the letters patent of the lord admiral for the time being, and allowed by other kings of the land ever since, and by custom time out of the memory of man, may have and enjoy cognition of all contracts, and other things, rising as well beyond, as upon the sea, without let or prohibition.

"*Answer.* This is agreed upon by the said lord chief justice, and his colleagues.

"*4th Request.* That the said judges may have and enjoy the knowledge of the breach of charter-parties, made betwixt masters of ships and merchants for voyages to be made to the parts beyond the sea, and to be performed upon and beyond the sea, according as it hath been accustomed time out of mind, and according to the good meaning of the 32d of *Henry* 8 c. 14 though the same charter parties be made within the realm.

"*Answer.* This is likewise agreed upon, for things to be performed, either upon or beyond the sea, though the charter party be made upon the land, by the statute of the 32d of *Henry* 8. *chap.* 14.

"*5th Request.* That writs of *corpus cum causa* be not directed to the said judge, in causes of the nature aforesaid, and if any happen to be directed, that it may please them to accept of the return thereof, with the cause, and not the body, as it hath always been accustomed.

"*Answer.* If any writ of this nature be directed in the causes before specified, they are content to return the bodies again to the lord admiral's gaol, upon certificate of the

sort must have been had for this purpose to the resolutions of the king in council, in 1575 and 1632, and to the statutes of Richard II. and Henry VIII.

cause to be such, or if it be for contempt or disobedience to the court in any such cause." *Zouch's Jurisdiction of the Admiralty of England Asserted.* 121.

Extract from "The complaint of the lord admiral of England, to the king's most excellent majesty, against the Judges of the realm, concerning prohibitions granted to the court of admiralty, 11 February, penultimo die Termini Hillarii, Anno 8. Jac. Regis: &c."

"5. To the end that the admiral jurisdiction may receive all manner of impeachment and interruption, the rivers beneath the first bridge where it ebbeth and floweth, and the ports and creeks, are by the judges of the common law affirmed to be no part of the seas, nor within the admiral jurisdiction: And whereupon prohibitions are usually awarded upon actions depending in that court, for contracts and other things done in those places; notwithstanding that by use and practice time out of mind, the admiral court have had jurisdiction within such ports, creeks, and rivers.

"7. That the agreement made anno domini 1575, between the judges of the king's bench and the court of admiralty for the more certain and quiet execution of admiral jurisdiction, is not observed as it ought to be." *Zouch.* Preface. The last of the above articles of complaint was answered by Sir Edward Coke in the name of the common-law judges as follows:

"*Answer.* The supposed agreement mentioned in this article hath not as yet been delivered unto us, but having heard the same read over before his majesty (out of a paper not subscribed with the hand of any judge) we answer, that for so much thereof as differeth from these answers, it is against the laws and statutes of the realm: and *therefore* the judges of the king's bench never assented thereunto, neither doth the phrase thereof agree with the terms of the law of the realm."

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The framers of the constitution took a large and liberal view of this subject. They were not ignorant of the usurpations of the common law courts upon the admiralty jurisdiction, and therefore used, *ex industria*, the broad terms "all cases of admiralty and maritime jurisdiction;" leaving the judiciary to determine the limit of these terms, not merely by the inconsistent decisions of the English common law courts, (which are irreconcileable with each other, and with the remains of jurisdiction that are by them acknowledged still to belong to the admiralty,) but by an impartial view of the whole matter, going back to its original foundations. What cases are "of admiralty and maritime jurisdiction," must be determined, either by their *nature*, or by the *place* where they arise. The first class includes all questions of prize, and all maritime contracts, wherever made, and wherever to be executed. The second includes all torts and offences committed on the high seas, and in ports and rivers within the ebb and flow of the tide. It is within the latter branch of the admiralty jurisdiction that the present case falls. The jurisdiction of the admiralty all over Europe, and the countries conquered and colonized by Europe, extends to the sea, and its inlets, arms, and ports; wherever the tide ebbs and flows. Even in England, this particular offence, when "committed in great ships, being hovering in the main stream of great rivers, beneath the bridges of the same, nigh to the sea," is within the admiralty jurisdiction. The place where this murder was committed is precisely within the jurisdiction of the admiralty as expounded

by Lord Hale in his commentary an the statute 28th Henry VIII. ch. 15. which has been preferred to Lord Coke's construction by all the judges of England in the very recent case of the King v. Bruce.[a]

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a "At the admiralty sessions holden at the Old Bailey in the year 1812, John Bruce was tried before Lord Ellenborough, Ch. J. for the wilful murder of a ferry boy of the name of James Dean.

"The evidence of the fact was extremely clear, and was fully confessed by the prisoner himself at the trial, and the jury found him guilty. But it appeared also, that the place in which this murder was committed is a part of Milford Haven, in the passage over the same, between Bulwell and the opposite shore, near the town of Milford, the passage there being about three miles over. It was about seven or eight miles from the mouth of the river or open sea, and about sixteen miles below any bridges over the river: the water there, which was always perfectly salt, was generally above twenty-three feet deep, and the place was, excepting at very low tides indeed, never known to be dry. Men of war of seventy-four guns were then building near an inlet close by the place. In spring tides, sloops and cutters of one hundred tons buthen, are navigable where the body was found, which is also nearby opposite to where men of war ride. The deputy Vice Admiral of Pembrokeshire said, that he had of late employed his water bailiffs to execute process in that part of the haven, but there was no evidence either way, as to the execution of the common-law process there.

"The court upon this evidence left the case to the jury, with observations as to the situation of the place, whether it was within the jurisdiction or not, and the jury found the prisoner guilty; but the case was saved for the opinion of the twelve judges.

"The question was, whether the place where the murder was committed was to be considered as within the limits to which commissions granted under the statute 28 Henry VIII. c. 15. for the trial of the

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The observation of Mr. Justice Buller, in Smart v. Wolff,[a] that "with respect to what is said relative to the admiralty jurisdiction in 4 *Inst.* 135., I think that part of Lord Coke's work has been always received with great caution, and frequently contradicted. He seems to have entertained, not only a jealousy of, but an enmity against, that jurisdiction," is a sufficient answer to any thing that depends on the authority of Lord Coke as to this controversy. If then the *locus in quo* be *within* the admiralty jurisdiction, it is "*out* of the jurisdiction of any particular state;" because all the states have surrendered, by the constitution, all the admiralty jurisdiction they formerly possessed to the United States. The cri-

offences therein mentioned, "committed in or upon the sea, or in any other haven, river, creek, or place, where the admiral or admirals have or pretend to have power, authority or jurisdiction," do by law extend.

"The judges, with the exception of Mr. Justice Grose, all assembled on the 23d of December, 1812, at Lord Ellenborough's chambers, to consider this question, and they were unanimously of opinion, that the trial was properly had, and that there was no objection to the conviction, on the ground of any supposed want of jurisdiction, in the commissioners appointed by commission, under the statute 28 Hen. VIII. c. 15. in respect of the place where the offence was committed. During the discussion of this point, the construction of this statute by Lord Hale in his Pleas of the crown, was much preferred to the doctrine of Lord Coke in his Institutes, and most, if not all the judges seemed to think that the common law had a concurrent jurisdiction in this haven; and in other havens, creeks and rivers in this realm." 2 *Leach's Crown Cases*, 1093. *Case* 352. *4th ed.* 1815.

[a] 3 *T. R.* 348.

minal branch of that jurisdiction has been given by the United States to the circuit court in the act of 1790, ch. 9. The *locus in quo* has not been shown to be *within* the state jurisdiction. Because the state process has been served therein is no proof of the legality of such service; and the case does not state that such process had been, in any instance, served on board the public ships of war of the United States. Those ships are exempt even from a foreign jurisdiction; and, when lying in the dominions of another nation, are not subject to its courts, but all civil and criminal causes arising on board of them are exclusively cognizable in the courts of the United States. This is a principle of public law which has its foundation in the equality and independence of sovereign states, and in the fatal inconveniences and confusion which any other rule would introduce. The merchant vessels of a nation *may* be searched for contraband, for enemy's property, or for smuggled goods, and, as some have contended, for deserters, whether they are on the high seas or in the ports of the searching power; but public ships of war may *not* be searched, whether on the high seas or in the ports of the power making the search. The *first* may be searched any where, except within the jurisdiction of a neutral state. They may be searched on the ocean; because there all nations have a common jurisdiction: They may be searched in the waters of the searching power; because the permission to resort to its ports, (whether implied or express,) does not import any exemption from the local

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jurisdiction.[a] The *latter* (i. e. public vessels) may not be searched any where, neither in the ports which they enter nor on the high seas. Not in the ports which they enter; because the permission to enter implies an exemption from the jurisdiction of the place. Nor on the high seas; because the common jurisdiction which all nations have thereon does not extend to a public ship of war, which is subject only to the jurisdiction of the sovereign to which it belongs. Every argument by which this exemption is sustained, as to foreign states, applies with equal force as between the United States and every particular state of the Union; and it is fortified by other arguments drawn from the peculiar nature and provisions of our own municipal constitution. The sovereignty of the United States and of Massachusetts are not identical; the former have a distinct sovereignty, for separate purposes, from the latter. Among these is the power of raising and maintaining fleets and armies for the common defence and the execution of the laws. If any particular state had it in its power to intermeddle with the police and government of an army or navy thus raised, upon any pretext, there would be an end of the exclusive authority of the United States in this respect. Wars and other measures, unpopular in particular sections of the country, might be impeded in their prosecution, by the interference of the state authorities. Such a conflict of jurisdictions must terminate in anarchy and confusion. But the court will take care that no such conflict shall

a The Exchange, 7 *Cranch*, 144.

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arise. The judiciary act of 1789, ch. 20. s. 11. giving to the circuit courts cognizance of all offences cognizable *under the authority of the United States* and the statute of 1790, ch. 9. declaring, that "if any person shall commit upon the high seas, or in any river, haven, basin, or bay, *out of the jurisdiction of any particular state*, murder, &c. he shall on conviction suffer death," and that "if any person or persons shall, within any fort, &c. or in *any other place* or district of country *under the sole and exclusive jurisdiction of the United States*, commit the crime of wilful murder, such person or persons, on being thereof convicted, shall suffer death," and a public ship of war, as well as the space of water she occupies, being "*out of the jurisdiction of any particular state*," and being "*a place*" *under the sole and exclusive jurisdiction of the United States*; it follows that the circuit court of Massachusetts district, had exclusive cognizance of this offence, which was committed out of the jurisdiction of any particular state, and in a place under the sole and exclusive jurisdiction of the United States.

Mr. *Webster*, in reply. The argument on the part of the United States is, that the circuit court has jurisdiction, first, because the murder was committed on board a national ship of war, in which no state can exercise jurisdiction; inasmuch as ships of war are considered as parts of the territory of the government to which they belong, and no other government can take cognizance of offences committed in them. Two answers may be given to this argument. The first is,

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that the main inquiry being, whether the circuit court has jurisdiction, and the jurisdiction of that court being only such as is given to it by the act of congress, it is sufficient to say that no act of congress authorizes that court to take cognizance of any offences, merely because committed on ships or war. Whether congress might have done this, or might not, it is clear that it has not done it. It is the nature of the place in which the ship lies, not the character of the ship itself, that decides the question of jurisdiction. Was the "haven" in which the murder was committed, within the jurisdiction of Massachusetts? If so, no provision is made by the act for punishing the offence in the circuit court. The law does not inquire into the nature of the employment or service in which the offender may have been engaged at the time of committing the offence; but only into the local situation or territory where it was committed. If committed within the territorial jurisdiction of a state, it excludes the jurisdiction of the circuit court by express words of exception. If, therefore, it has been shown that this haven or harbour is within the limits of Massachusetts, and under the general common law jurisdiction of that state, the offence being committed in that harbour, cannot be tried in the circuit court. The second answer is, that the doctrine contended for is applicable only between one sovereign power and another; a relation in which the government of the United States does not stand towards the state governments. Whenever ships of war of the United States are within the country, in the ports or harbours of any state, they

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are to be considered as at home. They are not then in foreign ports or harbours, and the jurisdiction of the states is, as to them, a domestic jurisdiction. If this be not so, persons on board such ships, though in the bosom of their own country, would be in most cases subject to no civil jurisdiction whatever. Even persons committing offences on land might flee on board such ships, and escape punishment, if they could not be followed by state process. The doctrine contended for would go to a great length. The cases cited speak of *armies*, as well as ships of war; and the doctrine, if applicable in the latter case, is equally so in the former. How then are offences to be punished, if committed by persons attached to the army of the United States, while in their own country? It is admitted, that in England, such offenders are punished in the courts of common law; and the act of congress establishing the articles of war, also provides expressly, that any officer or soldier accused of a capital or other crime, such as is punishable by the known laws of the land, shall be delivered to the civil magistrate, in order to be brought to trial. What civil magistrate is here intended? It must necessarily be such magistrate as acts under state authority, because no provision is made for the trial of such offenders in the courts of the United States. Perhaps such provision might be made by congress, relative as well to offences committed by soldiers in the army, as by seamen in the navy, under the general power to establish rules for the government of the army and navy. But no such provision has hitherto been made. State process, on the contrary, has

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been constantly served and obeyed in cases proper for the interference of the civil authority, both in the army and navy. Writs of *Habeas Corpus*, issued by state judges, have been served on, and obeyed by, military officers in their camps and naval commanders on their quarter decks.[a] To all these purposes the state courts are considered as parts of the general system of judicature established in the country. They are not regarded as foreign, but as domestic tribunals. The consequences, which it has been imagined might follow from the exercise of state jurisdiction in these cases, are hypothetical and possible only. Hitherto no inconvenience has been experienced. In most instances which might occur, this court would have a power of revision; and if, in other instances, inconvenience should be felt, it must be attributed to that distribution and partition of power, which the people have made between the general and state governments. It would be a strange inconsistency to hold the states to be foreign powers in relation to the government of the United States, and to apply to them the principles of the cases cited, and to hold their courts to be judicatures existing under a foreign authority; when the judgments of those courts are not only treated here as judgments of the courts of the United States are treated, but when also congress has referred to them the execution of many laws of the general government, and when appeals from their decision are constantly brought, in the provided cases, into this court by writ of error. It is also insisted,

[a] In the matter of Stacey, 10 *Johns. Rep.* 310.

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on the other side, that this is a case of admiralty and maritime jurisdiction. It is not a case of exclusive admiralty jurisdiction, if that jurisdiction is to be defined and limited in its application to the case, by the general principles of the English law. And not only must the common law be resorted to, for the interpretation of the technical terms and phrases of that science, as used in the constitution, but also for ascertaining the bounds intended to be set to the jurisdiction of other courts. In other words, the framers of the constitution must be supposed to have intended to establish courts of common law, of equity, and of admiralty, upon the same general foundations, and with similar powers, as the courts of the same descriptions respectively, in that system of jurisprudence with which they were all acquainted. Is there any doubt what answer they would have given, if they had been asked whether it was their purpose to include in the admiralty and maritime jurisdiction, such cases only as had been tried by the courts of that jurisdiction for a century, or whether they intended to confer the admiralty jurisdiction, as the civilians contend it existed before the time of Richard the Second? It is said, however, that there has been a practical construction given to this provision of the constitution, as well by congress as the courts of law, which has, in one instance at least, and that a very important one, departed from the limit assigned to the admiralty by the common law. This refers to seizures for the violation of the laws of trade and of the revenue; which seizures, although made in ports and harbours, and within the bodies of counties, are

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holden to be of admiralty jurisdiction, although such certainly is not the case in England. The existence of this exception must be admitted. The act to establish the judicial courts provides, that the district court "shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade, where the seizures are made on waters navigable from the sea, &c." Perhaps this act need not necessarily be so construed as to consider such seizures to be of admiralty jurisdiction, if they were not such before. The word "including" might refer to the general powers of the court, and not to the words immediately preceding, viz. "admiralty and maritime jurisdiction." But then such seizures, like other civil causes, are, by the constitution, to be tried by jury, unless they be of admiralty and maritime jurisdiction; and it must be admitted that this court has repeatedly decided, that they are of admiralty jurisdiction, and are not to be tried by jury. The first case is that of La Vengeance. The opinion of the court was delivered in this case, without giving the reasons upon which it was founded.[a] The next is the Sally.[b] This was decided without argument, and expressly on the authority of the preceding case. The point was made again in The United States v. The Betsey and Charlotte,[c] and decided as it had been before; the court considering the law to be completely settled by the case of The Vengeance. Two subsequent cases, the Samuel and the Octavia,[d] have

a 3 *Dall.* 297. *b* 2 *Cranch*, 406 . *c* 4 *Cranch*, 443. *d* 1 *Wheat.* 9. 20.

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been disposed of in the same manner. As was said in the argument of the case last cited, the arguments urged against the doctrine, in all the cases subsequent to the Vengeance, have always been answered by a reference to the authority of that case. As these cases have all been decided, without any exhibition of the grounds and reasons on which the decisions rest, they afford little light for analogous cases. They show, that in one respect, admiralty jurisdiction is here to be taken to be more comprehensive than it is in England. It will not follow that it is to be so taken in all respects. If this were to follow, it would be impossible to find any bound or limit at all. It is admitted, that this exception from the English doctrine of admiralty jurisdiction does exist here. But if distinct and satisfactory reasons for the exception can be shown, this will rather strengthen than invalidate the general position. Such reasons may, perhaps, be found in the history of the American colonies, and of the vice-admiralty courts established in them by the crown. The first and grand object of the English navigation act, (12 Ch. II.) seems to have been the plantation trade.[a] It was provided by that act, that none but English ships should carry the plantation commodities; and that the principal articles should be carried only to the mother country. By the subsequent act of 15 Ch. II. the supplying of the plantations with European goods was meant to be confined wholly to the mother country. Strict rules were laid down to secure the due

[a] *Reeve's Hist. Law of Ship.* 45.

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execution of these acts, and heavy penalties imposed on such as should violate them. Other statutes to enforce the provisions of these were passed, with other rules, and new penalties, in the subsequent years of the same reign. "In this manner was the trade to and from the plantations tied up, almost for the sole and exclusive benefit of the mother country. But laws which made the interest of a whole people subordinate to that of another, residing at the distance of three thousand miles, were not likely to execute themselves very readily; nor was it easy to find many upon the spot who could be depended upon for carrying them into execution."[a] In fact, these laws were, more or less, evaded or restricted in all the colonies. To enforce them was the constant endeavour of the government at home; and to prevent or elude their operation the constant object of the colonies. "But the laws of navigation were no where disobeyed and contemned so openly as in New-England. *The people of Massachusetts Bay were, from the first, disposed to act as if independent of the mother country;* and having a governor and magistrates of their own choice, it was very difficult to enforce any regulations which came from the English parliament, and were adverse to their colonial interest."[b] No effectual means of enforcing the several acts of navigation and trade had been found, when, in 1696, the act of 7 and 8 Will. III, ch. 22. was passed, *for preventing frauds, and regulating abuses in the plantation trade.* This act gave a new

a Reeves, 55. *b Id.* 57.

body of regulations; and, among other things, because great difficulty had been experienced in procuring convictions, new qualifications were required for jurors, who should sit in causes of alleged violation of the laws; and the officer or informer might elect to bring his prosecution in any county within the colony. All these correctives were of little force, so that the government soon after, with the view of securing the execution of this and the other acts of trade and navigation, *proceeded to institute courts of admiralty.*[a] These courts appear to have claimed jurisdiction in causes of alleged violation of the laws of trade and navigation, upon the construction of this act of 7 and 8 Will. III. In 1702, the Board of Trade, "being doubtful," as they say, "of the true jurisdiction of the admiralty," desired to be informed by the Attorney and Advocate General, (Sir Edward Northey and Sir John Cooke,) "whether the courts of admiralty, in the plantations, by virtue of the 7 and 8 of King William, or any other act, have there any further jurisdiction than is exercised in England? Whether the courts of admiralty, in the plantations, can take cognizance of questions which arise concerning the importation or exportation of any goods to or from them, or of frauds in matters of trade? And in case a vessel sail up any river with prohibited goods, intended for the use of the inhabitants, whether the informer may choose in what court he will prosecute—in the court of admiralty, or of common law?" The opinion of the Attorney General was, that "the act (7 and 8 Will. III.) gave the admiralty court in the

[a] *Id.* 70.

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plantations, jurisdiction of all penalties and forfeitures for unlawful trading, either in defrauding the king in his customs, or importing into, or exporting out of, the plantations, prohibited goods; and of all frauds in matters of trade, and offences against the acts of trade committed in the plantations:" and he mentions the case of Colonel Quarry, judge of the admiralty in Pennsylvania, then pending in the Queen's Bench, in which a judicial decision on the point might be expected. The opinion of the Advocate General was, of course, equally favourable to the admiralty jurisdiction.[a] On this construction of the statute, the courts of admiralty in the colonies assumed jurisdiction over causes arising from violation of the laws of trade and of revenue; "and from this time," says Mr. Reeves, "there seems to have been a more general obedience to the acts of trade and navigaton." This jurisdiction continued to be exercised by the colonial courts of admiralty down to the period of the revolution; and is still exercised by the courts of those colonies, which retain their dependence on the British crown.[b] This may be the ground on which it has been supposed that the states of the union, in forming a new government, and granting to it jurisdiction in admiralty and maritime causes, might be presumed to have included in the grant the authority to take cognizance of causes arising from the violation of the laws relative to customs, navigation, and

a Chalmers' Opinions of Eminent Lawyers, 187, 193.
b Bro. Civ. & Adm. Law, 492. 2 *Rob.* 248.

trade. All the colonies had seen this authority exercised as matter of maritime jurisdiction. It was not peculiar to the courts of any one of them, but common to all. It had been engrafted on the original admiralty powers of these courts for near a century. They were familiar to the exercise of this jurisdiction, as an admiralty jurisdiction. It had been incorporated with their admiralty jurisdiction, by statute; and they had long regarded it as a part of the ordinary and established authority of such courts. There might be reason, then, for supposing, that those who made the constitution, intended to confer this power as they found it. And if any other exception to the English definition, and limitation of the power of courts of admiralty, can be found to have been as early adopted, as uniformly received, as long practised upon, and as intimately interwoven with the system of colonial jurisprudence, there will be equal reason to believe that the framers of the constitution had regard to such exception also. Such exceptions do not impeach the rule. On the contrary, their effect is to establish it. If the exception when examined, appears to stand on grounds peculiar to itself, the inference is, that where no peculiar reasons exist for an exception, such exception does not exist. In the case before the court, no reason is given, to induce a belief that an exception does exist. No practice of excluding the common law courts from the cognizance of crimes committed in ports and harbours, is shown to have existed in any colony. There can be no doubt, there-

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fore, that, saving such exceptions as can be reasonably accounted for, the admiralty jurisdiction was intended to be given to the courts of the United States, in the extent, and subject to the limits, which belonged to it in that system of jurisprudence with which those who formed the constitution were well acquainted.

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Mr. Chief Justice MARSHALL delivered the opinion of the court. The question proposed by the circuit court, which will be first considered, is,

Whether the offence charged in this indictment was, according to the statement of facts which accompanies the question, "within the jurisdiction or cognizance of the circuit court of the United States for the district of Massachusetts?"

The indictment appears to be founded on the 8th sec. of the "act for the punishment of certain crimes against the United States." That section gives the courts of the union cognizance of certain offences committed on the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state.

Whatever may be the constitutional power of congress, it is clear that this power has not been so exercised, in this section of the act, as to confer on its courts jurisdiction over any offence committed in a river, haven, basin or bay; which river, haven, basin, or bay, is within the jurisdiction of any particular state.

What then is the extent of jurisdiction which a state possesses?

We answer, without hesitation, the jurisdiction of

a state is co-extensive with its territory; co-extensive with its legislative power.

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The place described is unquestionably within the original territory of Massachusetts. It is then within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded by the United States.

It is contended to have been ceded by that article in the constitution which declares, that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction." The argument is, that the power thus granted is exclusive; and that the murder committed by the prisoner is a case of admiralty and maritime jurisdiction.

Let this be admitted. It proves the power of congress to legislate in the case; not that congress has exercised that power. It has been argued, and the argument in a favour of, as well as that against the proposition deserves great consideration, that courts of common law have concurrent jurisdiction with courts of admiralty, over murder committed in bays, which are inclosed parts of the sea; and that for this reason the offence is within the jurisdiction of Massachusetts. But in construing the act of congress, the court believes it to be unnecessary to pursue the investigation which has been so well made at the bar respecting the jurisdiction of these rival courts.

To bring the offence within the jurisdiction of the courts of the union, it must have been committed in a river, &c. out of the jurisdiction of any state. It is not the offence committed, but the bay in which it is committed, which must be out of the jurisdiction of the

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state. If, then, it should be true that Massachusetts can take no cognizance of the offence; yet, unless the place itself be out of her jurisdiction, congress has not given cognizance of that offence to its courts. If there be a common jurisdiction, the crime cannot be punished in the courts of the union.

Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise.

This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory or of general jurisdiction. It is obviously designed for other purposes. It is in the 8th section of the 2d article, we are to look for cessions of territory and of exclusive jurisdiction. Congress has power to exercise exclusive jurisdiction over this district, and over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings.

It is observable, that the power of exclusive legislation (which is jurisdiction) is united with cession of territority, which is to be the free act of the states. It is difficult to compare the two sections together, without feeling a conviction, not to be strengthened by any commentary on them, that, in describing the judicial power, the framers of our constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction.

It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty

and maritime jurisdiction, is in the government of the union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away. The residuary powers of legislation are still in Massachusetts. Suppose for example the power of regulating trade had not been given to the general government. Would this extension of the judicial power to all cases of admiralty and maritime jurisdiction, have devested Massachusetts of the power to regulate the trade of her bay? As the powers of the respective governments now stand, if two citizens of Massachusetts step into shallow water when the tide flows, and fight a duel, are they not within the jurisdiction, and punishable by the laws of Massachusetts? If these questions must be answered in the affirmative, and we believe they must, then the bay in which this murder was committed, is not out of the jurisdiction of a state, and the circuit court of Massachusetts is not authorized, by the section under consideration, to take cognizance of the murder which had been committed.

It may be deemed within the scope of the question certified to this court, to inquire whether any other part of the act has given cognizance of this murder to the circuit court of Massachusetts?

The third section enacts, "that if any person or persons shall, within any fort, arsenal, dockyard, magazine, or in any other place, or district of country, under the sole and exclusive jurisdiction of the United

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States, commit the crime of wilful murder, such person or persons, on being thereof convicted, shall suffer death."

Although the bay on which this murder was committed might not be out of the jurisdiction of Massachusetts, the ship of war on the deck of which it was committed, is, it has been said, "a *place* within the sole and exclusive jurisdiction of the United States," whose courts may consequently take cognizance of the offence.

That a government which possesses the broad power of war; which "may provide and maintain a navy;" which "may make rules for the government and regulation of the land and naval forces," has power to punish an offence committed by a marine on board a ship of war, wherever that ship may lie, is a proposition never to be questioned in this court. On this section, as on the 8th, the inquiry respects, not the extent of the power of Congress, but the extent to which that power has been exercised.

The objects with which the word "*place*" is associated, are all, in their nature, fixed and territorial. A fort, an arsenal, a dock-yard, a magazine, are all of this character. When the sentence proceeds with the words, "or in any other place or district of country under the sole and exclusive jurisdiction of the United States," the construction seems irresistible that, by the words "other place" was intended another place of a similar character with those previously enumerated, and with that which follows. Congress might have omitted, in its enumeration, some similar place within its exclusive jurisdiction

which was not comprehended by any of the terms employed to which some other name might be given; and, therefore, the words "other place," or "district of country," were added; but the context shows the mind of the legislature to have been fixed on territorial objects of a similar character.

This construction is strengthened by the fact that at the time of passing this law, the United States did not possess a single ship of war. It may, therefore, be reasonably supposed, that a provision for the punishment of crimes in the navy might be postponed until some provision for a navy should be made. While taking this view of the subject, it is not entirely unworthy of remark, that afterwards, when a navy was created, and congress did not proceed to make rules for its regulation and government, no jurisdiction is given to the courts of the United States, of any crime committed in a ship of war, wherever it may be stationed.[a] Upon these reasons the court is of opinion, that a murder committed on board a ship of war, lying within the harbour of Boston, is not cognizable in the circuit court for the district of Massachusetts; which opinion is to be certified to that court.

The opinion of the court, on this point, is believed to render it unnecessary to decide the question respecting the jurisdiction of the state court in the case.

Certificate accordingly.

[a] This, it is conceived, refers to the ordinary courts of the United States, proceeding according to the law of the